Jone Theseira v Eileen Tan Ee Lian & Anor

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12-70 OF 2000
LOW HOP BING J
22 OCTOBER 2002

Civil Procedure *— Appeal — Interference by appellate court — Whether sessions court had arrived at proper and reasonable finding in relation to credibility of witnesses — Whether appellate court should interfere with specific finding of fact of a trial judge*

Civil Procedure *— Parties — Misjoinder of parties — Plaintiffs paid hospital bills for treatment of defendant's daughter — Action by plaintiffs against defendant to recover moneys paid — Whether daughter should have been made a defendant instead — Whether defendant had assumed responsibility for payment of daughter's hospital bills — Whether there was sufficient nexus for defendant to be properly sued*

Contract *— Quasi Contract — Restitution — Essential ingredients — Plaintiffs paid hospital bills for treatment of defendant's daughter — Action by plaintiffs against defendant to recover moneys paid — Whether act by plaintiffs was lawful — Whether act by plaintiffs was done for defendant — Whether act was not intended to be done gratuitously — Whether defendant enjoyed benefit of act — Contracts Act 1950 s 71*

This was an appeal by the defendant against the decision of the learned sessions court judge in giving judgment in the sum of S$28,206.34 and costs in favour of the plaintiffs. The plaintiffs were Singaporean citizens who were customers in the defendant's restaurant. The defendant had a 20-year old daughter ('Juliet') who suffered from a certain sickness that required expensive weekly injections. As Juliet's condition did not improve, the plaintiffs suggested to the defendant that Juliet be sent to Singapore for medical treatment. In view of the defendant's promise to repay the plaintiffs after the defendant had received insurance claims for Juliet, the plaintiffs had, on behalf of the defendant, made advance payment in settlement of the medical bills incurred at the Singapore hospitals. Notwithstanding that Juliet subsequently passed away, her medical bills were settled by the plaintiffs. The defendant failed to repay the plaintiffs although she had subsequently received the insurance claims. Hence, the plaintiffs commenced this action to recover the payment advanced on behalf of the defendant. The defendant's defence was that the plaintiffs had represented that the medical treatment for Juliet in Singapore was complimentary.

Held, dismissing the appeal:

(1) The evidence showed that the defendant had assumed responsibility for the payment of Juliet's hospital bills and was at all material times fully aware that she had to make payment thereof, as indeed she had done so to the extent of repaying RM42,000 to the plaintiffs. The benefit accrued to the defendant was that as a result of the plaintiffs' payment for Juliet's hospital

bills, the defendant could postpone the repayment thereof until receipt of the insurance claims. Further, it was the defendant who had sent Juliet to Singapore for treatment. Accordingly, there was sufficient nexus or close and substantial connecting factor for the defendant to be properly sued as a defendant in this action. The transaction relating to the payment of Juliet's hospital bills was a matter between the plaintiffs and the defendants (see pp 635G–I, 636B). A B

(2) The plaintiffs' claim was for restitution, that is, to recover the sum which the plaintiffs had expended in settlement of Juliet's hospital bills in Singapore. The plaintiffs' claim was therefore regulated by s 71 of the Contracts Act 1950 ('the Act') and being a cause of action based on quasi-contract, the question was to be determined by reference to s 71 and not on the existence of a contract in the conventional sense (see p 636D–G). C

(3) The doing of the act or the delivery of the thing in s 71 of the Act must: (a) be lawful; (b) be done for another person; (c) not be intended to be done gratuitously; and (d) be such that the other person enjoyed the benefit of the act or the delivery. In the instant case, the payment of the hospital bills by the plaintiffs was lawful and done for the defendant. Hence, conditions (a) and (b) had been satisfied. Further, the finding of fact was that the defendant would, upon receiving insurance monies, repay the plaintiffs the payment advanced by the plaintiffs for Juliet's hospital bills and so the plaintiffs' payment was not intended to be done gratuitously. The benefit accrued was that the defendant could postpone the repayment until receipt of the insurance claims. Therefore, conditions (c) and (d) too had been satisfied (see p 637A–C); *Goh Soon Ann v Sandvik Malaysia Sdn Bhd* [1984] 1 MLJ 121 and *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 followed. D E F

(4) There were merits in the plaintiffs' assertion that they had settled all the hospital bills incurred by Juliet and this fact has not been rebutted by the defendant. As for the defendant's challenge pertaining to first plaintiff's signature in the letter of guarantee given in favour of the Singapore hospitals, it was for the first plaintiff to raise this challenge had there been a suit against the first plaintiff by the hospitals concerned. Hence, there was no substance in the defendant's challenge (see p 638A–C). G

(5) The defendant's counsel had contended that the sessions court's failure to refer to the independent evidence of one Donald D'Cruz ('SD4') amounted to a misdirection because SD4 had corroborated the defendant's evidence that Juliet's treatment in the Singapore hospitals was complimentary. Although the sessions court did not make any specific reference to the evidence of SD4, there was a general reference in the judgment of the sessions court to the entire evidence adduced for both the plaintiffs and the defendant. In any case, SD4's evidence did not H I

establish that Juliet's hospital bills in Singapore were complimentary. In SD4's re-examination, he stated that the treatment at the Mount Alvernia Hospital in Singapore would have been complimentary had there been a letter from the priest. The priest did issue a letter but the same was merely a request for due consideration to be given in the form of special rebate to defray the entire cost of the treatment. This letter clearly showed that Juliet's treatment in Singapore would not be complimentary. Accordingly, there was no merit to the defendant's counsel's contention (see pp 638F–H, 639C–E).

(6) A further ground of appeal raised by the defendant's counsel was that the sessions court had not arrived at a proper and reasonable finding in relation to the credibility of the witnesses. An appellate court should be slow to interfere with a specific finding of fact of a trial judge who had the advantage of seeing and hearing the witnesses. In the instant case, the sessions court had taken great care in the evaluation of the witnesses and had arrived at the correct specific finding of facts based on the evidence adduced by the parties herein (see pp 639H, 640A–C).

[Bahasa Malaysia summary

Ini adalah satu rayuan oleh defendan terhadap keputusan hakim mahkamah sesyen yang bijaksana dalam memberikan penghakiman berjumlah S$28,206.34 dan kos bagi pihak plaintif-plaintif. Plaintif-plaintif yang merupakan warganegara Singapura adalah pelanggan restoran defendan. Defendan mempunyai seorang anak perempuan berusia 20 tahun ('Juliet') yang telah mengalami sejenis penyakit yang memerlukan suntikan mingguan yang mahal. Memandangkan keadaan Juliet tidak berubah, plaintif-plaintif telah mencadangkan kepada defendan agar Juliet dihantar ke Singapura untuk rawatan perubatan. Berdasarkan janji defendan untuk membayar balik plaintif-plaintif selepas defendan menerima bayaran bagi tuntutan insuran untuk Juliet, plaintif-plaintif telah, bagi pihak defendan, membuat bayaran pendahuluan bagi menyelesaikan bil-bil perubatan yang dikenakan di hospital-hospital di Singapura. Walaupun Juliet akhirnya telah meninggal dunia, bil-bil perubatan beliau telah diselesaikan oleh plaintif-plaintif. Defendan telah gagal untuk membayar balik plaintif-plaintif walaupun beliau kemudiannya telah menerima bayaran insuran tersebut. Justeru itu, plaintif-plaintif telah memulakan tindakan ini untuk mendapatkan balik bayaran yang telah didahulukan bagi pihak defendan. Pembelaan defendan adalah bahawa plaintif-plaintif telah menjelaskan bahawa rawatan perubatan untuk Juliet di Singapura adalah percuma.

Diputuskan, menolak rayuan tersebut:

(1) Keterangan menunjukkan bahawa defendan telah mengambil tanggungjawab untuk membayar bil-bil hospital Juliet dan pada

setiap masa matan mempunyai pengetahuan sepenuhnya bahawa beliau perlu membuat pembayaran tersebut, seperti yang telah beliau lakukan dahulu dengan membuat pembayaran kepada plaintif-plaintif sebanyak RM42,000. Faedah yang diperolehi oleh defendan adalah akibat daripada pembayaran bil-bil hospital Juliet oleh plaintif-plaintif, defendan boleh menangguhkan pembayaran balik tersebut sehingga menerima bayaran tuntutan insuran. Tambahan pula, defendanlah yang menghantar Juliet ke Singapura untuk rawatan. Sewajarnya, terdapat hubungan yang mencukupi atau faktor penghubung yang rapat dan substantial untuk defendan disaman secara betul sebagai seorang defendan dalam tindakan ini. Transaksi berkenaan dengan bayaran bil hospital Juliet adalah satu perkara di antara plaintif-plaintif dengan defendan (lihat ms 636G–I, 636B).

(2) Tuntutan plaintif-plaintif adalah untuk restitusi, iaitu, untuk mendapatkan balik jumlah yang plaintif-plaintif telah gunakan untuk menyelesaikan bil-bil hospital Juliet di Singapura. Oleh yang demikian, tuntutan plaintif-plaintif adalah dikawal oleh s 71 Akta Kontrak 1950 ('Akta tersebut') dan memandangkan ia satu kausa tindakan berdasarkan kuasi-kontrak, persoalan tersebut perlu ditentukan dengan merujuk kepada s 71 dan bukan berdasarkan kewujudan satu kontrak seperti lazimnya (lihat ms 636D–G).

(3) Perlakuan tindakan atau penyampaian benda dalam s 71 Akta tersebut mestilah: (a) sah; (b) dibuat untuk orang lain; (c) tidak bermaksud dibuat secara percuma; dan (d) di mana orang yang lagi satu telah menikmati faedah tindakan atau penyampaian tersebut. Dalam kes ini, pembayaran bil-bil hospital oleh plaintif-plaintif adalah sah dan dibuat untuk defendan. Justeru itu, syarat-syarat (a) dan (b) telah dipenuhi. Tambahan pula, penemuan fakta menunjukkan bahawa defendan akan, setelah menerima wang insuran, membayar balik plaintif-plaintif bayaran pendahuluan bil-bil hospital Juliet yang telah dibayar oleh plaintif-plaintif dan oleh itu pembayaran plaintif-plaintif tidak bermaksud untuk dibuat secara percuma. Faedah yang dinikmati oleh defendan adalah bahawa defendan boleh menangguhkan pembayaran balik sehingga beliau menerima bayaran tuntutan insuran. Oleh itu, syarat-syarat (c) dan (d) juga telah dipenuhi (lihat ms 637A–C); *Goh Soon Ann v Sandvik Malaysia Sdn Bhd* [1984] 1 MLJ 121 and *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 diikut.

(4) Terdapat merit dalam penegasan plaintif-plaintif bahawa mereka telah menyelesaikan kesemua bil-bil hospital yang dikenakan ke atas Juliet dan fakta ini tidak dipatahkan oleh defendan. Berkaitan cabaran defendan berkenaan dengan tandatangan plaintif pertama dalam surat jaminan yang diberi sebagai sokongan hospital-hospital Singapura, ia adalah untuk plaintif pertama menimbulkan cabaran ini sekiranya terdapat satu guaman

terhadap plaintif pertama oleh hospital-hospital tersebut. Justeru itu, cabaran defendan tidak kukuh (lihat ms 638A–C).

(5) Peguam defendan telah menegaskan bahawa kegagalan mahkamah sesyen untuk merujuk kepada keterangan berasingan daripada seorang bernama Donald D'Cruz ('SD4') membentuk satu salah arah kerana SD4 telah menyokong keterangan defendan bahawa rawatan Juliet di hospital-hospital Singapura adalah percuma. Walaupun mahkamah sesyen tidak membuat apa-apa rujukan khusus kepada keterangan SD4, terdapat satu rujukan umum dalam penghakiman mahkamah sesyen terhadap keseluruhan keterangan yang dikemukakan oleh kedua-dua pihak. Dalam apa keadaan, keterangan SD4 tidak menunjukkan bahawa bil-bil hospital Juliet di Singapura adalah percuma. Dalam pemeriksaan semula SD4, beliau telah menyatakan bahawa rawatan di Hospital Mount Alvernia di Singapura adalah percuma jika terdapat sepucuk surat daripada paderi. Paderi tersebut memang telah mengeluarkan sepucuk surat tetapi hanya merupakan satu permintaan agar pertimbangan sewajarnya diberikan dalam bentuk rebet khas untuk membayar keseluruhan kos rawatan tersebut. Surat ini dengan jelas menunjukkan bahawa rawatan Juliet di Singapore bukanlah percuma. Sewajarnya, tidak terdapat apa-apa merit terhadap pendapat peguam defendan (lihat ms 638F–H, 639C–E).

(6) Satu lagi alasan rayuan tersebut yang ditimbulkan oleh peguam defendan adalah mahkamah sesyen tidak tiba kepada satu penemuan yang betul dan munasabah berkaitan kebolehpercayaan saksi-saksi. Sebuah mahkamah rayuan sepatutnya tidak campur tangan dengan cepat berhubung satu penemuan khusus seorang hakim perbicaraan yang mempunyai kelebihan melihat dan mendengar saksi-saksi. Dalam kes ini, mahkamah sesyen mengambil berat tentang penilaian saksi-saksi dan telah tiba kepada penemuan fakta yang khusus berdasarkan keterangan yang dikemukakan oleh pihak-pihak tersebut (lihat ms 639H, 640A–C).]

Notes

For cases on interference by appellate court, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 854–867.

For cases on misjoinder of parties, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4287–4289.

For cases on quasi contract, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3491–3496.

Cases referred to

Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 117 (refd)

Eng Joo Private Limited v Kian Chang Granite Quarry Company (Pte) Limited [1986] 2 MLJ 256 (refd)

Goh Soon Ann v Sandvik Malaysia Sdn Bhd [1984] 1 MLJ 121 (folld) A
Leong Huat Sawmill (Pte) Ltd v Lee Man See [1985] 1 MLJ 47 (refd)
Ludhiana Transport Syndicate & Anor v Chew Soo Lan & Anor [1979] 2 MLJ 207 (refd)
Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors [1984] 1 MLJ 237 (refd)
Muthusamy v Ang Nam Cheow [1979] 2 MLJ 271 (refd) B
Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad [1989] 3 MLJ 155 (refd)
Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118 (folld)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283 C
(refd)
Yahaya bin Mohamad v Chin Tuan Nam [1975] 2 MLJ 117 (refd)

Legislation referred to

Contracts Act 1950 ss 2(a), (b), 3, 7, 71 D

Jerald Gomez (*Jerald Gomez & Assoc*) for the defendant.
Andre Wee Heng Leong (*Yap Koon Roy & Assoc*) for the plaintiffs.

Low Hop Bing J:

E

Appeal

This is an appeal by the appellant defendant ('defendant') against the decision of the learned sessions court judge ('sessions court') who had on 20 October 2000 given judgment in the sum of S$28,206.34 and costs in favour of the respondents plaintiffs ('plaintiffs'). F

Facts of the case

The grounds of decision delivered by the sessions court did set out in some detail the finding of facts. The facts are quite simple and straight- forward. The plaintiffs are Singaporean citizens who frequently visited Melaka as G
tourists as well as customers in the defendant's restaurant, as a result of which they became good friends.

Defendant had a 20-year old daughter by the name of Juliet. The defendant told the plaintiffs that Juliet was suffering from the disease of 'foot dropped' ie limping which required expensive weekly injections but H
without visible improvement.

Pursuant to plaintiffs' suggestion, defendant sent Juliet to two hospitals, viz Mount Alvernia and Gleneagles in Singapore for medical treatment. In view of the fact that the defendant was in financial straits and on the defendant's promise to repay the plaintiffs after the defendant has received insurance claims for Juliet, the plaintiffs had on behalf of the defendant I
made advance payment in settlement of the medical bills incurred in the treatment of Juliet.

A Unfortunately, death befell Juliet. Nevertheless, Juliet's medical bills were settled by the plaintiffs. Although the defendant has received her insurance claims from American International Assurance resulting from Juliet's death, the defendant has failed to repay the plaintiffs. Hence, the plaintiffs' action herein to recover the payment advanced on behalf of the defendant.

B The defendant denied the debt due to the plaintiffs as, according to the defendant, the plaintiffs have told the defendant that the medical treatment for Juliet in Singapore was complimentary and that the defendant would not have sent Juliet for treatment there if it had been otherwise. The defendant stressed she had sent Juliet for treatment in Singapore as a result of the C plaintiffs' promises and that the defendant did believe that the treatment there was indeed complimentary. The defendant added that as soon as she knew she was unable to obtain complimentary treatment for Juliet, the defendant immediately obtained financial assistance from charitable bodies and collections from her restaurant to repay to the first plaintiff.

D *Counsel's submissions and decision by court*

Proper defendant

In relation to a point of procedure, it was submitted by learned counsel, Mr Jerald Gomez for the defendant that the proper defendant to this suit E should be Juliet and not Jone Theseira who has in her defence denied owing the sum claimed by the plaintiffs. Although Mr Andre Wee Heng Leong, learned counsel for the plaintiff, contended that the issue relating to the proper defendant to be sued has not been pleaded in the defence, I am of the view that the defence read as a whole including the defendant's defence F expressly and specifically denying the debt constituting the plaintiff's claim herein, is sufficiently wide to encompass the ancilliary issue relating to the correct party to be sued as the defendant. That being the case, it is appropriate for the respective learned counsel to raise this issue in their submissions.

Having disposed of this preliminary point, I now proceed to consider G the question as to whether Jone Theseira has been properly sued as the defendant. It is to be observed that she is the person to whom the benefit has accrued.

In my view, the entire evidence demonstrates that the defendant had assumed responsibility for the payment of the hospital bills for her daughter H Juliet and was at all material times fully aware that she had to make payment thereof, as indeed she had done so, to the extent of repaying RM42,000 to the plaintiffs and that amount is not the subject matter of this appeal. The benefit which accrued to the defendant was that as a result of the plaintiffs' payment for Juliet's hospital bills, the defendant could postpone the repayment thereof, until upon receipt of insurance claims by the defendant. I It was the defendant who sent Juliet to Singapore for treatment and so in my view there is sufficient nexus or close and substantial connecting factor for Jone Theseira to be properly sued as a defendant.

A subsidiary issue was raised for the defendant that Juliet being 20 years of age had attained the age of majority and was not disqualified from contracting, in which case, Juliet should have been the defendant. In this regard, the facts established in the evidence are crucial. It is clear that the defendant has assumed the responsibility of repaying all sums paid by the plaintiffs in settlement of Juliet's hospital bills. Paragraph 7 of the statement of defence averred that the defendant has repaid the plaintiffs a total of RM42,000 in Singapore, as indeed is the fact alluded to above. Hence, the transaction relating to the payment of Juliet's hospital bills was a matter between the plaintiffs and the defendant and not with Juliet whose age of majority is of no consequence and is indeed irrelevant.

Restitution or contract

The next ground raised for the defendant is that the plaintiffs have failed to prove a contract of any kind with the defendant as there was no offer, no acceptance, no consideration and no intention to create legal relations as required under s 2(a) to (b), ss 3 to 7 of the Contracts Act 1950.

The stand taken by the plaintiffs is that the plaintiffs' claim is for restitution ie to bring back or recover the sum which the plaintiffs had expended or paid in settlement of Juliet's hospital bills in Singapore.

In my judgment, I hold that the sessions court is correct in dealing with the action as one based on restitution. This was indeed the original stand taken by learned counsel for the defendant who relied on s 71 of the Contracts Act 1950 which is a statutory statement of restitution in Part VI of the Contracts Act 1950 regulating 'certain relations resembling those created by contract' which essentially are 'quasi-contracts'. It is my considered view that the stand now taken for the defendant seems to run counter to the defendant's reliance on s 71 of the Contracts Act 1950.

There is no doubt that the plaintiffs' claim is grounded on restitution which is regulated by s 71, supra, and being a cause of action based on quasi-contract, the question is to be determined by reference to s 71, supra, and not on the existence of a contract in the conventional sense in which the elements to be established are an agreement based on consensus ad idem, consideration and intention to create legal relations, all of which require an entirely different treatment.

Further, the benefit which accrued to the defendant, Jone Theseira comes within the meaning of the benefit in s 71 of the Contracts Act 1950 which merits reproduction as follows:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

The finding of fact is to the effect that the defendant would upon receiving insurance monies repay the plaintiffs the payment advanced by the plaintiffs for Juliet's hospital bills and so the plaintiffs' payment was not intended to be done gratuitously.

The Federal Court in *Goh Soon Ann v Sandvik Malaysia Sdn Bhd* [1984] 1 MLJ 121, following the Privy Council in *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118, explained that four conditions must be satisfied to establish a claim under s 71, in that the doing of the act or the delivery of the thing in s 71:

(1) must be lawful;

(2) must be done for another person;

(3) must not be intended to be done gratuitously; and

(4) must be such that the other person enjoys the benefit of the act or the delivery.

The payment of the hospital bills by the plaintiffs was lawful and done for the defendant who is Juliet's mother. Hence, conditions (1) and (2) above have been satisfied; so also conditions (3) and (4) viz non-gratuitous payment by the plaintiffs and benefit accrued to the defendant, which have been dealt with above.

Hence, where any of these four conditions such as (2) and (4) have not been satisfied, as in *Goh Soon Ann*, the Federal Court had no hesitation in dismissing the claim under s 71. Hence *Goh Soon Ann*, relied upon by the defendant is of no assistance to her.

Be that as it may, it is pertinent to consider the finding of facts in the sessions court to the effect that the defendant did request the plaintiffs to settle Juliet's hospital bills in return for the defendant's promise to repay the plaintiffs upon the defendant receiving insurance claims from the insurance policies in relation thereto. This is in actual fact a promise in exchange for a promise which is good consideration in law: *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 (CA). The Court of Appeal there further explained that s 2(a) of the Contracts Act 1950 declares that 'every promise and every set of promises, forming the consideration for each other, is an agreement'. The consideration is executory based on an exhange of promises which sufficies to constitute a legally binding contract.

Payment not proved

The third point canvassed for the defendant is that there is a claim by the plaintiffs for the 1997 bill which has not been proved to have been paid and that the judgment has been given by the sessions court for the full sum for all the bills. It was also submitted for the defendant that the guarantee at p 34 of the appeal record is suspect as there were only two signatures, viz one by the first plaintiff and the other by a witness, but the witness was never called to testify. It was also argued for the defendant that the first plaintiff is liable only on the default on the part of the patient Juliet or the estate of the patient and there must be a demand on the first plaintiff as the guarantor.

It was submitted for the plaintiffs that pursuant to the guarantee the plaintiffs have settled a sum of S$8,146.03 in 1997 and that the plaintiffs have paid a total sum of S$28,206.34 pursuant to the failure or default by

the defendant to settle Juliet's hospital bills which have been pleaded and particularised in para 6 of the plaintiffs' amended statement of claim. A

I am of the view that there are merits in the plaintiffs' contention as the plaintiffs have as a matter of fact settled all the hospital bills incurred by Juliet and this fact has not been rebutted by the defendant.

The challenge pertaining to the guarantee mounted by the defendant is B the usual challenge that would have been available to the guarantor ie the first plaintiff had there been a suit against the first plaintff by the hospitals in whose favour the first plaintiff has executed the guarantee. I am however unable to see any substance in the defendant's aforesaid challenge as the obligations contained in the guarantee has been performed by the first plaintiff in the settlement of the hospital bills actually incurred by Juliet. C

Lest the decision of the Federal Court in *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155 which has been relied on by the defendant, is misunderstood, I find it necessary and significant to refer to the facts of the case which demonstrate plainly that the action was commenced by the respondent- D banker against the appellant-guarantor who has executed a guarantee in favour of the respondent-banker. The defence pertaining to the absence of an antecedent demand was raised by the appellant-guarantor. The Federal Court did not hold that a non-guarantor (such as the person in the position of Jone Theseira as the defendant herein) can raise this defence. Hence the Federal Court's decision is not an authority in support of the aforesaid E contention raised for the defendant who was not the guarantor in the said guarantee.

Independent evidence

Defendant's learned counsel stressed that the failure by the sessions court F to take account of or to refer to the independent evidence of SD4 one Mr Donald D'Cruz, amounted to a misdirection, as SD4 has corroborated the defendant's evidence that Juliet's treatment in the Singapore hospitals was complimentary as was shown in the letter dated 11 April 1997 from the parish priest of St Francis Xavier.

G

For the plaintiffs, it was submitted that the evidence of SD4 is inherently incredible as he was a family friend of the defendant and therefore not an independent witness.

While it is true that the sessions court has made no specific reference to SD4's evidence, it must be pointed out that there is a general reference in H the last paragraph of the judgment of the sessions court to the entire evidence adduced for both the plaintiffs and the defendant when she arrived at her finding on a balance of probabilities and hence allowed the plaintiffs' claim with interest and costs.

However, since this appeal is by way of a rehearing, I shall now evaluate the evidence of SD4 who has been a family friend of the defendant for the I past 12 years. SD4 testified in his examination in chief that he met the first plaintiff in the general hospital Kuala Lumpur where the first plaintiff told

A SD4 'tidak perlu bayar' ('no need to pay') but wanted a letter from the priest. SD4 added 'we said Mount Alvernia is a charitable hospital' and that the first plaintiff called SD4's house and asked 'us to get a letter from priest — free treatment'. SD4 knew Juliet has an insurance policy of which the defendant has informed SD4. The defendant also told SD4 that the defendant went to Singapore four to five times to make payment of Juliet's B hospital bills. Under cross-examination, SD4 testified that Mount Alvernia Hospital was going to give Juliet free treatment, but not Gleneagles Hospital. SD4 did not agree that the plaintiff never said that the treatment would be free in Singapore. SD4 said that Juliet would not have gone to Singapore had it not been complimentary, despite her insurance coverage. C When re-examined SD4 said that actually the treatment in Mount Alvernia Hospital would have been complimentary had there been a letter from the priest and that it was Juliet who told SD4.

In my view, SD4's evidence did not establish that Juliet's hospital bills in Singapore were complimentary, as there was a pre-requisite for a letter from the priest for consideration of complimentary treatment. Even if there D were such a thing as complimentary treatment, it was only to be confined to Mount Alvernia Hospital. However, as para 3 of the priest's letter dated 11 April 1997 at p 17 of the appeal record expressly requested for due consideration to be given in the form of special rebate to defray the entire cost of the treatment, it is clear to me that this contemporary letter confirmed that Juliet's treatment in Singapore would not be E complimentary.

The absence of any reference to SD4's evidence cannot fairly be construed as a misdirection. As a matter of fact, a reference to SD4's evidence which I have evaluated herein would have undoubtedly strengthened and confirmed the finding of fact by the sessions court. I am F therefore unable to uphold the defendant's aforesaid contention.

Credibility of witness

On this issue, it was argued for the defendant that the sessions court had not taken into account the probative value of the evidence and so the conclusion G was flawed, especially in the evidence of the defendant whose education never went beyond standard one and whose evidence was very straightforward which should have been believed and accepted by the sessions court. Learned counsel for the defendant contended that the plaintiffs were making up the story as they went along and that the plaintiffs were not telling the truth.

H It was submitted for the plaintiff that, inter alia, the sessions court has arrived at a proper and reasonable finding in relation to credibility, based on the hearing of witnesses whose demeanour was subject to observation by the sessions court.

In my judgment, the issue for determination herein relates to I credibility. There is a plethora of authorities enunciating the function of an appellate court where credibility of a witness is called into question. A classic statement has been handed down by the Privy Council in *Yahaya bin*

Mohamad v Chin Tuan Nam [1975] 2 MLJ 117 to the effect that an appellate court should be slow to interfere with a specific finding of fact of a trial judge who has had the advantage of seeing and hearing the witnesses. Other cases of high authority include *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 (PC); *Ludhiana Transport Syundicate & Anor v Chew Soo Lan & Anor* [1979] 2 MLJ 207 (PC); *Muthusamy v Ang Nam Cheow* [1979] 2 MLJ 271 (PC); *Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors* [1984] 1 MLJ 237 (FC); *Leong Huat Sawmill (Pte) Ltd v Lee Man See* [1985] 1 MLJ 47 (FC); *Eng Joo Lee Private Limited v Kian Chang Granite Quarry Company (Pte) Limited* [1986] 2 MLJ 256 (PC).

I have repeatedly perused the grounds of decision of the sessions court and am of the view that the sessions court has taken great care in the evaluation of the witnesses in arriving at the correct specific finding of facts based on the evidence adduced by the parties herein. I therefore hold that this ground of appeal cannot be sustained.

Conclusion

On the foregoing grounds, the inevitable conclusion is that the appeal is devoid of merits and is hereby dismissed with costs.

Appeal dismissed.

Reported by Lim Lee Na